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Supreme Court, U.S.
FILED
MAY 23 1997
CLERK

No. 96-1695

IN THE

Supreme Court of the United States

October Term, 1996

ATTALA COUNTY, MISSISSIPPI, ET AL.,
Petitioners,

v.

BERNARD TEAGUE, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS BERNARD TEAGUE, ET AL.

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QUESTION PRESENTED

Whether the Court of Appeals erred in its holding that, in light of the totality of circumstances, the plaintiffs proved a violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, under the particular facts of this case?

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BRIEF IN OPPOSITION FOR RESPONDENTS BERNARD TEAGUE, ET AL.

This is a garden variety redistricting case brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. It presents no novel issues of law, no conflict between the Circuits or with precedents of this Court, and no basis upon which this Court should exercise its certiorari jurisdiction. The issues raised by the petitioner are issues that actually do not exist in the case, and the petitioner's claim that they do exist is based upon a misconstruction of the opinion of the Court of Appeals.

STATEMENT

This case involves a challenge to the redistricting plan in

Attala County, Mississippi used to elect five supervisors and five election commissioners from five single member districts and the separate redistricting plan used to elect two justice court judges and two constables from two single member districts. The respondents Bernard Teague, et al., black voters from Attala County, filed this case on August 7, 1991, alleging that these plans violate Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and also alleging that the supervisors' plan violates the one-person, one-vote rule of the Fourteenth Amendment because it has a total population deviation of 14.4 percent.

After a three day bench trial in September, 1992, the District Court found for the defendants on all claims. 807 F.Supp. 392 (N.D. Miss. 1992), pet. app. 1. The plaintiffs appealed and on April 1, 1994, the United States Court of Appeals for the Fifth Circuit issued an opinion affirming the District Court's ruling on the one-person, one-vote claim, but reversing and remanding for further proceedings on the Section 2 claim. 17 F.3d 796 (5th Cir. 1994), pet. app. 26. On remand, the United States intervened in support of the plaintiffs. The District Court permitted the parties to introduce evidence regarding events and elections occurring since the original trial, and the parties agreed to present this evidence by way of affidavits. On March 20, 1995, the District Court ruled once again for the defendants. Pet. App 32. The private plaintiffs and the United States both appealed, and on August 8, 1996, the Fifth Circuit reversed, holding that the plaintiffs had proven a Section 2 violation and remanding for further proceedings in which the County would have an opportunity to develop a remedy. 92 F.3d 283 (5th Cir. 1996), pet. app. 58. The defendants sought rehearing and rehearing en banc, both of which were denied on January 22, 1997 in an order stating that no member of the panel and no judge in active service had requested a poll on the suggestion of rehearing en banc. Pet. App. 86.

Approximately 40% of the citizens of Attala County, Mississippi are black. Despite this fact, no black citizens have been elected in modern times to public office in Attala County as justice court judge or constable, or any of a host of other county offices. Pet. App. 34, 38-39. Prior to 1984, there were no black members of the county board of supervisors, and since then there has never been more than one. Pet. App. 7, 55; Pretrial Order at 5; Exhibit D-3. Prior to 1988, there were no black members of the county election commission, and since then there has never been more than one. **Id.** No black citizen has won election to a county office from a majority white voting age population (VAP) election district. The only black candidates elected to county office ran from the few majority-black VAP election districts that exist in the county. Indeed, in the entire county, no black candidate has ever won a contested election for **any** office -- county or municipal -- from a majority-white VAP election district. Pet. App. 7, 38-39, 55 and n. 16.

The two redistricting plans under challenge in this case were adopted in 1983. Even though the county is 40% black, the supervisors plan has only one majority black VAP district among the five districts, and that is the district from which the only black members of the board of supervisors and the election commission have been elected. Pet. App. 2-8, 34-37, 55, Pretrial Order at 5. And even though the county is 40% black, neither of the two districts in the justice court plan is majority black. Pet. App. 38.

When the 1990 census data was released, several years after these plans were adopted, the data demonstrated a 14.4% deviation among the existing supervisory districts. Accordingly, Attala County retained a demographer to develop a new supervisory plan based upon the 1990 data. During this redistricting process, a group of black citizens came before the board of supervisors at the public hearing and requested that

supervisory district 2 be reconfigured to contain a majority black VAP district. Trial transcript 160-161. The demographer later prepared a supervisory redistricting plan with two majority black VAP supervisory districts. Tr. 167. This plan was never adopted by the board of supervisors. Instead, Attala County adopted a new supervisory plan based on 1990 data containing only one majority black VAP district and that plan was submitted for Section 5 review. On July 15, 1991, the United States Attorney General received the submission and interposed a Section 5 objection by letter dated January 13, 1992. Pretrial Order at 7.

Rather than design a new plan, the county decided to continue using the 1983 plan. Because of the county's decision to retain the 1983 plan, the trial of this case and the evidence presented during the remand focused on that plan. The evidence demonstrates the following:

** As the District Court found, the county easily could have drawn a compact second black majority voting age population district among the five districts in the supervisory plan, and easily could have drawn one compact black majority voting age population district among the two in the justice court plan. Pet. App. 16-17, 28 n.2, 40.

** Elections between black and white candidates in the county are characterized by racially polarized voting. As the District Court stated on remand: "[T]here can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County." Pet. App. 48. The District Court cited the ecological regression findings of the plaintiffs' expert at the original trial to the effect that white voters gave, on average, 85% of their vote to white candidates and 15% to black candidates in black-white races, while black voters gave, on average, 87% of their vote to black candidates and 13% to white candidates. Pet. App. 45. The District Court also noted the

ecological regression findings of the plaintiffs' and intervenor's experts on remand showing that in the post-trial black-white elections, approximately 83% of white voters supported white candidates and 17% supported black candidates, on average, while approximately 90% of black voters supported black candidates and 10% supported white candidates, on average. Pet. App. 45. As the District Court pointed out, the findings of the defendants' expert were "similar to the . . . findings of the plaintiffs' experts." Pet. App. 44, 46. The plaintiffs' experts also used an "extreme case" analysis, showing that black candidates received a very small percentage of the vote from precincts with 80% or more of white voters. Pet. App. 47.

** The result of this pattern of racial polarization is that no black candidates have been elected to county office in Attala County from majority white voting age population districts, and none have won a contested election to any sort of office -- county or municipal -- from a majority white voting age population district. Pet. App. 38-39, 55 and n.16. Indeed, no black candidate has ever received a majority of the white vote in a county election. Pet. App. 50. All of this led the District Court to conclude that "the statistical evidence . . . favors a finding of racial bloc voting." Pet. App. 48.

** There is a long history of racial discrimination in Mississippi and Attala County that included discrimination with respect to the right to vote. Pet. App. 52-53; Tr. 11, 136-139. As the District Court stated: "There can be no question of the long history of discrimination against blacks in Mississippi and Attala County." Pet. App. 52-53.

** Among the vestiges of this discrimination are the severe socioeconomic disparities that leave black citizens in Attala County much worse off than white citizens. As the District Court said: "There can be no question of the socioeconomic disparities between whites and blacks in Attala

County." Pet. App. 53. For example, black per capita income is less than half that of whites, the black poverty rate is nearly three times that of whites, the black unemployment rate is nearly twice that of whites, and the white high school graduation rate is nearly twice that of blacks. Ex. P-2.

** The rate of black turnout for elections is much lower than that of whites. Exhibit P-1 at 3. As the District Court stated: "[P]laintiffs have already proven and the court has found evidence of depressed black voter participation in Attala County." Pet. App. 54.

** Mississippi uses a majority-vote requirement for primary and special elections involving county offices. Miss. Code § 23-15-305; Pretrial Order at 8.

** Racial appeals have been made in elections in Mississippi and within Attala County. Tr. 171-173.

** Racist remarks have been made and racial epithets have been used by several white elected supervisors in recent years in Attala County, and evidence was presented that the presiding officer of the board of supervisors once said someone was as "stubborn as a nigger mule." Tr. 193-195.

** Only a handful of black citizens serve on county boards and commissions, and there are few black employees in county jobs, with the exception of manual labor jobs. Tr. 178-179, 381-384.

** Civic, social, and religious life in Attala County is segregated by race. Churches are segregated by race as a practical matter, as are country clubs, civic clubs, and social clubs. Tr. 187-188, 344.

Despite all of this evidence, and despite the 40% black

population in the county, the District Court upheld the supervisory plan with only one black-majority voting age population district of five and the justice court plan with no black-majority voting age population district of two. In its initial opinion, the District Court rejected the plaintiffs' proof of racial polarization in voting. Pet. App. 17-20. Alternatively, the District Court held that even if Attala County elections are afflicted by polarized voting, black voters have an equal opportunity under the challenged plans in light of the totality of circumstances. The Court based this holding largely on its conclusion that black electoral failure in the county is the result of "the failure to energize an apathetic electorate." Pet. App. 21-23.

On appeal, the Fifth Circuit vacated and remanded, holding that the District Court had failed to consider and discuss the plaintiffs' ecological regression evidence of polarized voting. Pet. App. 30-31.

On remand, after receiving additional evidence of post-trial events, the District Court once again rejected the plaintiffs' Section 2 claim. Although that Court concluded that "there can be **no doubt** that the statistical evidence in the record favors a finding of racial bloc voting in Attala County," pet. app. 48 (emphasis added), the Court inexplicably held that the plaintiffs had failed to prove racial bloc voting. The Court stated: "Although statistical evidence may weigh in favor of a finding of racial polarization, the court is of the opinion that this evidence alone is not sufficient." Pet. App. 51. More specifically, the Court said statistical evidence of polarization is insufficient because "[s]tatistics examine how, rather than why, people vote the way they do." Pet. App. 50. The Court held that the strong evidence of polarization from the ecological regression analysis was insufficient to prove black political cohesion, pet. app. 48; that the analysis of a single precinct in one election and another precinct in another election indicated some level of black

crossover voting, pet. app. 19-20, 48-49, 51; and that two defense witnesses had expressed the opinion that citizens in Attala County sometimes based their votes on nonracial factors. Pet. App. 50-51. On these grounds, and despite the strong evidence of racial polarization, the District Court concluded that the plaintiffs "have failed to establish that voters in Attala County cast their vote on the basis of race, to the exclusion of other nonracial factors . . . ." Pet. App. 51. Accordingly, the District Court ruled for the defendants on the racial polarization issue.

In the alternative, the District Court held that -- even if racial bloc voting were found -- the plaintiffs would lose their case under the totality of circumstances. Despite the presence of a history of discrimination and socioeconomic disparities, the District Court held that the plaintiffs had failed to prove that these factors contribute to the depressed level of participation, holding instead that the disparities in participation are the result of what the District Court called "apathy." Pet. App. 52-55. The District Court also stated that "factors other than race influence voters in Attala County." Pet. App. 55. It repeated its holding from before the remand that "[r]ather than unequal opportunity, the source of minority defeat can be traced to the failure to energize an apathetic electorate." Pet. App. 54. On these grounds, and despite the evidence of severe polarization and the consistent defeat of black candidates in majority-white districts, the District Court concluded -- under the totality of circumstances -- that "blacks in Attala County have the ability to . . . elect candidates of choice equal to that of others in the electorate." Pet. App. 57.

Both the private plaintiffs and the United States appealed. The Fifth Circuit reversed, citing the District Court's own finding that "there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County," and holding that the District Court erred in refusing to

give any credence to that finding in its ultimate judgment. As the Court of Appeals explained, the District Court erred by completely disregarding the evidence from the regression analysis, and instead basing its conclusion regarding polarized voting on the results from a single precinct in one election and another precinct in in another election. The Court of Appeals also said the District Court erred by concluding that non-racial factors were the cause of the consistent defeat of black candidates in majority-white districts in the midst of polarized voting, when in fact there was no proof to that effect other than generalized statements from two local politicians.

As the Court of Appeals said:

> The Supreme Court in **Gingles** said that the results of a couple of elections do not discount the presence of racial bloc voting: "[a] pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." **Gingles**, 478 U.S. at 57. "a showing that bloc voting is not absolute does not preclude a finding of racial polarization." **Gingles** stressed that, to be legally significant, racial polarization need only be the "usual[]" pattern for a significant proportion of voters. **Id**. Vote dilution is a determination that must be made over time and over the course of many elections. How many elections must be studied to make this determination depends on the particular circumstances of the locale. **Id**. at 57 n.25. However, we have no trouble concluding that the district court's assessment of vote dilution based on two precincts in two elections is insufficient to overcome the admittedly compelling statistical evidence of racial bloc voting in Attala County.
>
> The language from **Gingles** quoted above directly undercuts the district court's reliance on the Sallis and

> McCool precinct returns. From those discrete examples of voting in two particular precincts in two different elections, the district court deduced that "voters in Attala County are not driven by race." This finding is clearly erroneous.

Pet. App. 68-69.

> [The District Court] repeated its statement in **Teague I**, 807 F.Supp. at 403 . . . that "[f]actors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County." . . . According to the [District] court, "Statistical analyses do not encompass other factors and variables that provide further insight into voting behaviors and patterns. Statistics examine how, rather than why, people vote the way they do."
>
> The district court's view disregards the established acceptance of regression analysis as a standard method for analyzing racially polarized voting. **Gingles**, 478 U.S. at 52-53 n. 20.

Pet. App. 71-72.

> In the face of a strong statistical case that defendants were unable to shake, general statements that race played no role at the polls carry little weight, and a district court errs by adjusting the plaintiffs' burden of proof on the basis of such testimony. In short, the district court placed upon the plaintiffs the insurmountable burden of coming forward with evidence disproving all nonracial reasons that can explain election results in spite of the fact that the defendant had itself produced no real evidence that factors other than race were at work.
>
> [In the first appeal] [t]his court remanded for a more

> thorough discussion by the district court of the statistics which made up the principal evidence plaintiffs offered. But the district court chose to skirt this charge by averring that "this evidence alone is not sufficient." Without substantially more in the way of particularized findings contradicting the numbers, the district court may not totally discount methodology that both the Supreme Court and this court have cited with approval. **Gingles**, 478 U.S. at 52-54. . . .
>
> After a careful and complete review of the trial court record, we find overwhelming evidence of racial polarization. . . . The district court failed to give serious consideration to the statistical evidence for which this case was remanded.

Pet. App. 75-76.

The Court of Appeals also held that the District Court erred in concluding that, despite the "totality of circumstances" evidence showing a violation, there was no violation because, in the District Court's words, "[r]ather than unequal opportunity, the source of minority candidate defeat can be traced to the failure to energize an apathetic electorate." Pet. App. 54. The District Court specifically based this conclusion on evidence showing lower voter participation in recent years among **both** blacks and whites. As the Court of Appeals explained:

> The district court determined that voter apathy influenced election results in Attala County largely on the basis of testimony from defendant's trial expert, Whittemore, who testified regarding a sharp decline in voter participation and voter turnout by both blacks and whites from 1988-1990. To conclude that black voter apathy is the reason for the failure of blacks to elect the candidates of their choice when apathy affects all voters is counterintuitive. The fact

> that blacks **and** whites in Attala County are going to the polls in decreasing proportions does not explain why blacks alone are essentially shut out of the political processes for the county.
>
> . . . . The presence of voter apathy is not a matter for judicial notice. **Kirksey v. Board of Supervisors**, 554 F.2d 139, 145 (5th Cir.)(en banc), **cert. denied**, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed. 2d 454 (1977). The record before us does not contain evidence to support the district court's conclusion that voter apathy is the reason for the failure of blacks in Attala County to elect the candidates of their choice to political office. **See, United States v. Dallas County Comm'n**, 739 F.2d 1529, 1536 (11th Cir. 1984).

Pet. App. 83-84 (emphasis in original).

ARGUMENT

The questions presented by the petitioners are questions that do not actually exist in this case. They are, in effect, manufactured by the petitioners based upon a misconstruction of the Court of Appeals' holding.

Because the second of the two questions can be discussed more quickly, we deal with it first. According to the petitioner, the Court of Appeals "confined Petitioners' proof of nonracial explanations [of voting patterns and electoral results] to evidence that voters choose candidates based on partisanship, not race." Pet. Cert. 23. To support this, the petitioner cites the Court of Appeals' discussion of the en banc Fifth Circuit decision in **LULAC v. Clements**, 999 F.2d 831 (5th Cir. 1993) (en banc), **cert. denied**, 510 U.S. 471 (1994). In the present case, the Court said: "In **LULAC**, we did not hold that the plaintiff has the burden of negating all nonracial reasons possibly

explaining plaintiffs' statistical case. That case concerned a different problem -- the role of partisan politics." Pet. App. 84. However, this description of **LULAC** was never used by the Court of Appeals to restrict nonracial explanations in this case to partisan voting. Indeed, the Court of Appeals made it clear that a district court should consider any proffered evidence of nonracial factors -- without restriction -- that would account for the voting patterns at issue. Pet. App. 72. On this point, the Court of Appeals, pet. app. 72, cited the Eleventh Circuit's en banc decision in **Nipper v. Smith**, 39 F.3d 1494, 1524 (11th Cir. 1994) (en banc), **cert. denied**, 115 S.Ct. (1995), which held the same thing. Had the Court of Appeals limited the analysis to partisan explanations, much of its discussion of other purported nonracial factors, pet. app. 72-75, would have been irrelevant. Rather than limiting the scope of nonracial explanations to partisan voting patterns, the Court of Appeals instead held that the District Court erred because there was "no real evidence that [any] factors other than race were at work" in the relevant elections. Pet. App. 75.[1]

As for the first question presented, it is based upon the petitioner's view that the Court of Appeals adopted -- to use the language of the page of questions presented, -- "a presumption" that plaintiffs can "establish[] a violation of § 2 . . . by offering statistical evidence that black and white voters prefer different candidates." Of course, the Court of Appeals did no such thing. Instead, consistent with this Court's holding in **Johnson v. DeGrandy**, 512 U.S. 997 (1994), it first analyzed whether the

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[1] Much of the Court of Appeals' discussion, including the descriptive reference to **LULAC,** revolved around where the burden falls of producing evidence of nonracial explanations. Pet. App. 72-75, 84. As is clear from the petition for certiorari itself, the petitioners actually agree with the Court of Appeals that, once a plaintiff proves the **Gingles** factors, defendants such as petitioners have the burden of presenting evidence of nonracial explanations for the voting patterns. Pet. Cert. 24-25 n.8.

plaintiffs had established the **Gingles** factors. As the Court of Appeals noted, these are established not simply by a showing regarding polarized voting, but also a showing that "(1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single member district," pet. app. 65 -- a factor about which there was no dispute in this case. Pet. App. 16-17, 28 n.2, 40. Moreover, the necessary polarized voting showing is not made simply by -- to use the petitioner's language -- "statistical evidence that black and white voters prefer different candidates," but as the Court of Appeals explained, by a demonstration that "(2) the minority group [is] politically cohesive and (3) . . . that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." Pet. App. 65, **citing, Thornburg v. Gingles**, 478 U.S. at 50-51. The Court of Appeals then stated that "[e]ven if the plaintiffs satisfy these prerequisites, the court must still look to the 'totality of circumstances' to determine whether the challenged electoral system is equally open to minority voters." Pet. App. 65, **citing, Johnson**, 512 U.S. at 1011-1012.

According to the petitioners, the "presumption" about which they complain comes from this language in the Court of Appeals opinion:

> [I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three **Gingles** factors but still have failed to establish a violation of § 2 under the totality of circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act.

Pet. App. 80-81, **quoting, Clark v. Calhoun County**, 21 F.3d 92, 97 (5th Cir. 1994).

The first sentence of this quote is not any sort of legal presumption, but simply a description of the empirical fact that most plaintiffs who establish the existence of the three **Gingles** factors go on to prove a violation under the totality of circumstances. This is quite similar to what this Court said in **Johnson**: "[L]ack of equal electoral opportunity may be readily imagined and **unsurprising** when demonstrated under circumstances that include the three essential **Gingles** factors." 512 U.S. at 1012 (emphasis added). But just as this Court added in **Johnson** that such a "conclusion must still be addressed explicitly, and without isolating any other arguably relevant facts from the act of judgment," **id.**, the Court of Appeals specifically held that even if plaintiffs satisfy the **Gingles** factors, they must still prove their case based upon an analysis of the totality of circumstances. Pet. App. 65. The Court of Appeals never held that proof of the **Gingles** factors creates any sort of "presumption."

The second sentence of the Court of Appeals quote merely instructs district courts to make detailed findings when they conclude that the **Gingles** factors are present but no Section 2 violation exists. Rather than "dramatically chang[ing] the law of § 2," as the petitioners insist, pet. cert. 17, this is in keeping with longstanding precedent in the Fifth Circuit requiring district courts to make detailed findings and to consider both supporting and contrary evidence in resolving vote dilution cases. **See, Westwego Citizens for Better Government v. Town of Westwego**, 872 F.2d 1201, 1203-1204 (5th Cir. 1989) ; **Velasquez v. City of Abilene**, 725 F.2d 1017, 1023 (5th Cir. 1984).

Nothing about any of this violates precedent from this Court or conflicts with that from other Circuits.

The petitioners go on to contend that this so-called "presumption" is aggravated because, they say, the Court of Appeals "combined the second and third **Gingles** factors into a single statistical analysis of whether racially polarized voting existed," and thus "effectively collapsed the 'totality of circumstances' inquiry -- a multi-factor analysis -- into a single-factor analysis . . . ." Pet. Cert. 17-18. As we have already pointed out, the Court of Appeals did not hold that racially polarized voting by itself was sufficient to prevail in a Section 2 case. As for the purported combination of the second and third **Gingles** factors, this Court in **Gingles** pointed out that both of those factors are related to the question of polarized voting. "The purpose of inquiring into the existence of racially polarized voting is two fold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority preferred candidates." 478 U.S. at 56. The Court of Appeals' discussion of the second and third factors is fully in keeping with **Gingles**. Indeed, the evidence was quite clear that black voters generally supported black candidates and white voters did not, instead voting sufficiently as a bloc for white candidates to **always** defeat the candidate of choice of black voters in majority white election districts.

The petitioners also assert that the so-called "presumption" about which they complain was further aggravated by the following:

> The Court of Appeals compounded its error by improperly substituting its view of the facts for that of the District Court on the question of whether Respondents had proved racial bloc voting. The District Court found that the expert testimony presented by the parties "on racial bloc voting patterns varied considerably," . . . (App. 44), although that court found that the evidence favored Respondents, . . . (App. 48). The District Court also concluded, however,

> that such findings "do not end the inquiry." *Id.* (App. 48). Relying on the testimony of both black and white politicians in the County, the District Court found that county voters cast their ballots not on the basis of race but, rather, on the candidates' qualifications, education, contact with the electorate, and experience. . . (App. 50-51).

Pet. Cert. 18. According to the petitioners, the Court of Appeals ran afoul of this Court's statement in **Anderson v. City of Bessemer**, 470 U.S. 564, 573-574 (1985), that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Pet. Cert. 19.

However, **Anderson's** teaching comes into play only if the District Court's account of the evidence was "plausible." Here, it was not. While the District Court noted that the expert opinions on the meaning of the evidence "varied considerably," the Court said the "statistical evidence produced by both sides . . . was somewhat similar." Pet. App. 44. **See also** Pet. App. 46 ("the statistical findings [of the defendants' expert] were similar to the . . . findings of plaintiffs' experts.") On the basis of this undisputed analysis, the District Court concluded "there can be **no doubt** that the statistical evidence in the record favors a finding of racial bloc voting in Attala County." Pet. App. 48 (emphasis added). This is a finding that the petitioners have never challenged.

Yet the District Court went on to conclude that "a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County." Pet. App. 50. That conclusion was not plausible in light of the evidence. The "black and white politicians" to whom the petitioners refer, pet. cert. 18, were

Troy Hodges and H.L. Myrick, discussed by the District Court at pet. app. 50-51. Hodges merely said that "Race won't keep you from being elected" and "blacks won't vote for a candidate just because [the candidate] is black or white." Pet. App. 50. According to the District Court, Myrick -- a long-time black alderman elected from a majority black district -- felt he had received a strong white cross-over vote and testified that whites sometimes consider nonracial factors in casting their ballots. Pet. App. 50-51. Actually, the transcript shows that Mr. Myrick said only the following:

> Q . . . From your own personal experience and your own perception as a candidate, what have you experienced in regard to crossover voting?
>
> A I haven't experienced it. No crossover voting.
>
> * * *
>
> THE COURT: . . . Mr. Myrick, who elected you? Did you get black votes? Did you get white votes? That's what he's trying to ask.
>
> A I got both.

Tr. 559-561. Mr. Myrick went on to say that he always has run and won from a majority black district, **id**. at 561, and while he did say he got some white votes, he never said the crossover voting was "strong" or reached any other level of significance. The defendants presented no statistical analysis of the voting patterns in his election. And as the Court of Appeals noted, Mr. Myrick also testified that while black and white volunteers had assisted a particular white candidate against another white candidate, he was aware of no whites ever campaigning for a black candidate. Pet. App. 73.

Of course, if all that were necessary to defeat a Section 2 claim is for a couple of local politicians to come to Court and say that race is not an important factor, no cases ever would be won by plaintiffs and Section 2 would be a dead letter. Given the flimsy nature of these opinions from two local politicians in this case, the Court of Appeals quite correctly stated that "the defendant . . . produced no real evidence that factors other than race were at work" in the relevant elections. Pet. App. 75. Beyond that, neither the District Court nor the Petitioners have ever explained why -- if qualifications rather than race are the key factors in Attala County elections -- the voting patterns are so polarized, why no black candidate has ever received a majority of the white vote in an election against a white candidate, and why no black candidate has ever been elected in a majority white voting age population district.

The clear error rule is not a rubber stamp for any district court decision, no matter how egregious and unsupportable. Nothing about the Court of Appeals decision in this case ran afoul of the appropriate analysis under that rule. As this Court suggested in **Johnson**, where a district court's finding in a vote dilution case is based upon "a misreading of the governing law," 512 U.S. at 1022, this often leads to clear error. Here, as the Court of Appeals pointed out, the District Court misread the governing law in a number of ways -- including a disregard of the ecological regression analysis, a disregard of its own finding of polarization based upon that analysis, a displacement of that analysis by the results of a single precinct in one election and another precinct in another, and a further displacement of that analysis by the unsupported opinions of two entrenched county politicians that qualifications control the outcome of elections and not race. Pet. App. The resulting reversal by the Court of Appeals was quite proper.

Finally, with respect to the so-called "presumption," the petitioners complain that any presumption "is particularly

inappropriate in a case like the present one, where Respondents seek two BVAP majority districts (40%) in a county where blacks constitute only 35% of the voting-age population." Pet. Cert. 17. Two points are important here. First, the petitioners have never argued, in the lower courts or here, that the countywide 35% black voting age population provides them an absolute defense given that there already is one black majority voting age district and given that a second one would mean 40% of the districts are majority black in voting age population. They simply say that this aggravates the "presumption" of the Court of Appeals. Since the Court of Appeals adopted no such "presumption," this point is irrelevant to the case the petitioners seek to bring to this Court. Second, even if the petitioners had preserved such a claim independent of their "presumption" argument, this Court's decision in **Johnson** indicates that such a claim would not be viable. In **Johnson**, this Court rejected a rule that would have said, "as a matter of law no dilution occurs whenever the percentage of single-member districts in which minority voters form an effective majority mirrors the minority voters' percentage of the relevant population." 512 U.S. at 1017. If the petitioners here had made a similar argument, it would be that no dilution ever can occur in a five district plan when 20% of the seats are majority black in voting age population and the population of the relevant jurisdiction is anything less than 40% black in voting age. As this Court said in **Johnson**, such "[a]n inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'" **Id**. at 1018. Indeed, if the petitioners were to prevail on such a claim, it would mean that any jurisdiction could -- as a matter of law -- construct a plan based on the notion that the 65% white voting age population is always entitled to control at least 80% of the seats, even in a polarized electoral situation where no black candidate has ever won a contested election in a majority white district, without ever being subject to scrutiny under the Voting Rights Act.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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